AMIRUL HAKIM DZULKEFLY A

v.

PP

HIGH COURT MALAYA, SHAH ALAM B
COLLIN LAWRENCE SEQUERAH JC
[CRIMINAL APPEAL NO: 41H-112-05-2014]
24 JULY 2014

CRIMINAL PROCEDURE: *Sentence - Appeal against - Child under 18 years old - Charged for armed robbery - Sentenced to undergo rehabilitation at Henry Gurney School - Whether trial judge gave undue emphasis on seriousness of offence - Whether public interest outweighed mitigating factors - Child Act 2001, ss. 2, 98 - Penal Code, ss. 395 & 397* C D

The appellant was charged with armed robbery with two others still on the loose under ss. 395 and 397 read together with s. 34 of the Penal Code. He pleaded guilty to the charge. As he was 17 years and 21 days of age at the time of the incident (a child under 18 years of age according to s. 2 of the Child Act 2001), he was convicted and sentenced to undergo rehabilitation at the Henry Gurney School in Malacca for a period of three years from the date of the order. His appeal was against the order to be sent to the school, on grounds *inter alia* (i) that the Sessions Court Judge had given undue emphasis on the seriousness of the offence; (ii) that public interest would be best served if the appellant was given a chance to mend his ways; and (iii) that the trial judge had not given due consideration to the welfare report that recommended the appellant be placed under the supervision of his parents and bond for good behaviour. E F G

Held (dismissing appeal; affirming sentence by Sessions Court):

(1) The fact that no actual injury was occasioned to the victim in this case ought not to detract from the fact that the victim here was subjected to the threat of a parang attack. The apprehension that he must have felt at the time when confronted with that weapon could not be trivialised. Even though the victim was not actually harmed, the offence committed was still of a serious nature and this was rightfully H I

A reflected in the maximum sentence of 20 years as imposed by s. 395 and whipping under s. 397 of the Code. The fact that it was the appellant's first offence could not outweigh the seriousness of the offence either. (paras 15 & 16)

B **(2)** Is it clear that an order for probation can only be made in cases of offences which are not categorised as of a grave nature as enumerated under s. 98 of the Child Act 2001. It was held that in all the circumstances of the case, a probation order was not an appropriate one. (paras 28 & 29)

C **Case(s) referred to:**
Azwel Mohd Ali lwn. PP [2012] 6 CLJ 809 CA ***(refd)***
Dato Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC ***(refd)***
Mohamed Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
D *PP v. Azmadi Aznan Dumin [2012] 1 LNS 9 HC* ***(refd)***
PP v. KM (A Child) & Anor [2010] 9 CLJ 605 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
Reg v. JH Sargeant [1975] 60 Cr App R 74 ***(refd)***

Legislation referred to:
E Child Act 2001, ss. 2, 75(1)(b)(i), (ii), 91(1)(f), 98
Penal Code, ss. 34, 395, 397

For the appellant - Zamri Ibrahim; M/s Hanif & Co
For the prosecution - Izalina Abdullah; DPP

F *Reported by Lyana Shohaimay*

JUDGMENT

G **Collin Lawrence Sequerah JC:**

The Charge

[1] The charge in the Sessions Court against the child abovenamed as read in Bahasa Malaysia was as follows:

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> Bahawa kamu bersama-sama 2 orang lagi yang masih bebas pada 21hb Januari 2014, jam lebih kurang 1815hrs di Jalan Mahagoni 3A/1, Batang Kali, di dalam daerah Hulu Selangor, dalam negeri Selangor telah melakukan rompak bersenjata parang dan telah
> I melarikan sebuah telefon bimbit jenama Nokia warna hitam model 202, milik (1) lelaki India nama: KPL RF/113462 Aruldass a/l Appadorai sehingga menyebabkan kerugian sebanyak RM263.

Oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 395/397 Kanun Keseksaan dan boleh dihukum di bawah peruntukan seksyen yang sama. Pertuduhan dibaca bersama-sama dengan seksyen 34 Kanun Keseksaan.

[2] Section 395 of the Penal Code (Act 574) imposes a punishment for a term which may extend to 20 years and shall also be liable to whipping for gang-robbery.

[3] Section 397 imposes, in addition to any other punishment to which he may be liable under any other section of the code, whipping if at the time of committing or attempting to commit robbery, the offender is armed with or uses any deadly weapon or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person.

[4] The appellant child was aged 17 years and 21 days at the time of the incident. A child is defined by s. 2 of the Child Act 2001 as a person under the age of 18 years. He pleaded guilty to the charge and was accordingly convicted and was ordered to undergo rehabilitation at the Henry Gurney School, Telok Mas, Malacca for a period of three (3) years from the date of the order.

[5] The appellant child now appeals against the order to send him to the Henry Gurney School.

Powers Of The Court

[6] The powers of the court in respect of children on proof of an offence being committed are contained in s. 91 of the Child Act 2001 (Act 611) ('the Act'). There are several courses of action open to the court. One of these is s. 91(1)(f) of the Act which orders the child to be sent to an approved school or a Henry Gurney school.

[7] Section 75 of the Act outlines when a child can be sent to the Henry Gurney School. Sub-section (1) provides if:

75(a) A child is found guilty of any offence punishable with imprisonment;

(b) The probation report submitted to the court for children shows that:

(i) the parents or guardian of the child can no longer exercise or is incapable of exercising any proper control over him;

A (ii) the child is habitually in the company of persons of bad character; and

(iii) the child is not suitable to be rehabilitated in an approved school; and

B (c) it appears to the court for children:

(i) that the offence committed is serious in nature; and

(ii) by reason of the nature of the child's criminal habits and tendencies it is expedient that the child be subject C to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime.

[8] The court for children shall on the recommendation of the probation officer, send the child to a Henry Gurney School. D

Grounds Of Appeal

[9] By way of summary, the petition of appeal filed discloses five (5) grounds in respect of which the Sessions Court had erred. E They are:

(1) Giving undue emphasis to the seriousness of the offence.

(2) Not considering that public interest would be best served if the appellant child is given a chance to mend his ways. F

(3) Failure to consider that the conditions under the Act did not apply to the appellant child.

(4) Failure to give due consideration to the welfare report which G recommended that the appellant child be placed under the supervision of both his parents.

(5) Failure to give due consideration to the principles of law that favoured the appellant child being placed under a bond for good behaviour under the supervision of both parents. H

Findings And Decision Of The Court

[10] The appellant has launched various grounds of attack against the decision of the Sessions Court. One of these grounds is that I the Sessions Court was unduly swayed by the seriousness of the offence. He also finds fault with the Sessions Court Judge for not taking into account the fact that this was the appellant's first offence.

[11] Now, the objectives of sentencing are considered as trite. In *PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256 the court held:

> One of the main considerations in the assessment of sentence is of course the question of public interest. On this point I need only quote a passage from the judgment of Hilbery J in *Rex v. Kenneth John Ball* 35 Cr App R 164 as follows:
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> > In deciding the appropriate sentence the court should always be guided by certain considerations. The first and foremost is the public interest.

[12] In *Mohamed Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209; [1988] 1 MLJ 167 it was held as follows:

> In assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering, firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and, fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any.

[13] In *Reg v. JH Sargant* [1975] 60 Cr App R 74 it was held:

> Those classical principles are summed up in four words, retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.

[14] It can thus be clearly seen that the principles of sentencing consist of a combination of factors and a consideration of all the circumstances of the case must be taken into account.

[15] The Sessions Court Judge had considered that the public interest had outweighed the individual interests of the appellant. The Sessions Court Judge's reliance on the case of *PP v. Azmadi Aznan Dumin* [2012] 1 LNS 9 was assailed as being not applicable as the case involved rape. The appellant contends that the victim here did not suffer any injury and that the phone was recovered and returned to the victim.

[16] The fact that no actual injury was occasioned to the victim here ought not to detract from the fact that the victim here was subjected to the threat of a parang attack. The apprehension that he must have felt at the time when confronted with that weapon cannot be trivialised. This court finds that even though no actual injury was occasioned to the victim, the offence committed was nevertheless of a serious nature. The seriousness of the offence committed is rightfully reflected in the maximum sentence of 20 years imposed by s. 395 of the Penal Code.

[17] The seriousness of such offence being committed using a weapon is further underscored by s. 397 which additionally imposes whipping. This court therefore finds that the fact that this is the appellant's first offence cannot outweigh the seriousness of the offence committed. The fact that the case cited involved a different offence is of little significance in the light of the fact that in the instant case the offence is no less serious.

[18] The Sessions Court Judge had rightfully taken public safety and order into account in coming to his sentence. In so doing he had correctly assessed that the public interest had outweighed any mitigating factors that may have weighed in the appellant's favour.

[19] The appellant further contends that the provisions of s. 75 of the Act do not apply to the appellant. He further contends that the Sessions Court Judge had erred in failing to consider the probation report by the welfare officer that the appellant be placed under a bond for good behaviour under the supervision of his parents.

[20] There is no dispute that the offence committed is serious in nature. The probation report by the welfare officer recognises that this is so. The appellant contends that the circumstances enumerated in s. 75(1)(b)(i), (ii) and (iii) is not borne out by the contents of the probation report.

[21] The probation report exh. P8 is contained at p. 41 to 47 of the record of appeal ('ROA'). At p. 44 of the ROA, the probation report states that the parents of the appellant cannot guarantee how far the effects of mixing with friends would influence the appellant's behaviours when he is out of the house as both parents are working and cannot devote their full care, attention and control over the appellant whom it is said, they trust can take of himself and think for himself in a mature manner.

[22] It must be remembered that the offence took place while the appellants was out with his friends. Exhibit P1, the facts of the case, to which the appellant had pleaded guilty to, reveals that while OKT4 kept watch over the place of the incident, OKTB1, OKTB2 who is the appellant and OKTB3 committed the robbery on the victim.

[23] In any event, the charge incorporated s. 34 of the Penal Code, that of common intention, so that it matters not that, according to the probation report, the appellant was not the one holding the weapon or that he was unaware of its existence until the robbery took place.

[24] This court is fortified in its reasoning by a number of authorities. In the case of *PP v. Azmadi Aznan Dumin* [2012] 1 LNS 9, Abdul Rahman Sebli J held:

> The respondent may be young at the time he committed the offence but was obviously not too young to commit an adult offence. He is therefore not too young to face the consequences of his act. He even had the audacity to trespass into the victim family's house in order to have sex with the victim. According to the facts of the case he had raped the victim on many occasions prior to the present offence. The facts also show that he was in possession of a pair of pliers when he was caught. The Probation Officer had strong words for the respondent. This is what she said in her probation report:
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> > Perbuatan penama adalah perbuatan yang salah dan keterlaluan jika dibandingkan dengan umur penama. Penama telah melakukan kesalahan yang sangat berani apabila datang ke rumah teman wanitanya untuk melakukan hubungan seksual dan bermalam di sana tanpa pengetahuan keluarga teman wanitanya.
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> Age is a factor to be considered but not the only factor and certainly not the most important factor. The interest of the public must be the overriding consideration in passing sentence, irrespective of the age of the offender. It is natural for any magistrate to be sympathetic towards a child accused but this must be balanced against the harm that a lenient punishment may cause to the public. A lenient sentence may give the public the wrong impression that if a child commits rape, he will be dealt with leniently by the court. Instead of acting as a deterrent, the punishment may encourage youngsters who are similarly inclined

A to commit the same offence. This is not the sort of signal that the court should give to the public. In my view the binding over order imposed by the learned magistrate is not reflective of the seriousness of the offence and the public abhorrence for this type of criminal conduct by a child. The learned magistrate had also failed to direct her mind to section 98 of the Act which reflects by necessary implication that a bond of good behaviour, like a probation order is not appropriate for an offence as serious as rape although it is within the magistrate's power to make such order. In my view the appropriate order to be given is the order under section 91(1)(f) of the Act which is to order the respondent to be sent to the Henry Gurney School.

[25] In the case of *Azwel Mohd Ali lwn. PP* [2012] 6 CLJ 809 the Court of Appeal held:

D Kepentingan awam mengatasi kepentingan peribadi. Pertimbangan bahawa perayu berumur 17 tahun 2 bulan semasa kesalahan dilakukan dan bahawa dia merupakan seorang pesalah pertama tidak dapat menghakiskan pertimbangan kepentingan dan keselamatan awam berkaitan suatu kesalahan yang sangat serius, yang patut diberikan keutamaan bagi menetapkan hukuman ke atas perayu. (perenggan 17 & 29)

Sesuatu hukuman 'deterrence' bukan sahaja menghalang perayu daripada mengulangi kesalahannya tetapi juga menghalang orang lain daripada melakukan kesalahan yang sama. Hukuman bercirikan `rehabilitation' pula bertujuan untuk memulihkan perayu menjadi F orang yang baik dan dapat diterima oleh masyarakat selepas menjalani hukuman berkenaan. Perayu sudah berumur 19 tahun 6 bulan ketika pendengaran rayuan. Sekiranya permohonan perayu dibenarkan, beliau hanya perlu berada di Sekolah Henry Gurney bagi tempoh satu tahun enam bulan. lni adalah tempoh yang singkat dan tidak mencukupi untuk memulihkan perayu. (perenggan G 21 & 35)

[26] In *PP v. KM (A Child) & Anor* [2010] 9 CLJ 605 Abang Iskandar JC (as he then was) held as follows:

H (3) An order of imprisonment to be imposed on a child ought to be a measure of last resort. If the circumstances before the court warrant an imposition of an order of imprisonment on a child offender, the court ought to act accordingly. Section 91(1) of the Act provides the court with an array of options to determine the kind of order it should make in its discretion. (para 9)

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(4) KM ought not to be returned to his family home because from the probation reports on him, his family was not in a conducive state to provide him with an environment to flourish or live like a normal child. In the instant case, the options open to the court were those enumerated under s. 91(1)(f) and (h) of the Act, to wit: (i) send him to an approved school; (ii) send him to a Henry Gurney School; or (iii) impose upon him imprisonment. A probation order under s. 98 of the Act was not possible due to the serious nature of the offences. (paras 12 & 13)

(5) KM could not be sent to an approved school under s. 67 of the Act since the offences were serious in nature and there was no such recommendation by his probation officer in the probation reports submitted to court. KM would also not qualify to be sent to a Henry Gurney School under s. 75 of the Act because there was no evidence that he was not suitable to be rehabilitated in an approved school, as required under s. 75(1)(b)(iii) of the Act. There was also no such recommendation from his probation officer. The court cannot issue an order sending a child to an approved school or to a Henry Gurney School without first perusing a probation report on the child and in the absence of such recommendation. Where there is no such recommendation from the probation officer, it would mean that the corrective institutions were not suitable in the interest of the child's welfare. (para 13)

[27] These cases reflect the principle that the seriousness of the offence committed outweighs the offenders age and the fact that they were first offenders. In fact, in the case of *PP v. KM (A Child) & Anor*, a term of imprisonment was imposed.

[28] With respect to the appellants contention that a probation order be made instead, s. 98 of the Act enumerates the circumstances under which a probation order may be made:

98(1) If a court for children by or before which a child is found guilty of an offence other than:

(a) Any grave crime;

(b) Voluntarily causing grievous hurt, rape, incest or outraging modesty; or

(c) An offence under ss. 377B, 377C, 377D or 377E of the Penal Code.

A is of the opinion that having regard to the circumstances, including the nature of the offence and the character of the child, it is appropriate to do so, the court for children may make a probation order.

B **[29]** It is therefore clear that an order for probation can only be made in the case of offences which are not categorised as of a grave nature. As alluded to earlier, the seriousness of the offence with which the appellant child was charged with, is rightfully reflected in the maximum sentence imposed, which is 20 years C with an additional punishment of whipping should the offence involve the use of a weapon.

[30] This court therefore is of the view that in all the circumstances of the case, a probation order is not an appropriate one.

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[31] The fact of the matter is that the appellant was influenced by persons of bad character in the commission of the offence and the probation report provides no indication that the control of the parents over the appellant would ensure that such an act does not E repeat itself.

[32] On the contrary, the parents work commitments do not provide the opportunity for the exercise of proper control over the appellant as borne out by the probation report especially when in F the company of his friends. The welfare officer in the probation report had in fact considered the seriousness of the offence when he recommended that the appellant be sent to Henry Gurney School.

G **[33]** His recommendation was supported by one of the child advisors who was of the view that the appellant either be bound over for good behaviour with a fine or be sent to Henry Gurney School.

[34] This court therefore finds that the Sessions Court Judge had H not erred in coming to a decision to send the appellant to the Henry Gurney School. He had applied the correct principles.

[35] In *Dato Seri Anwar Ibrahim v. PP* [2002] 3 CLJ 457; [2002] 3 MLJ 193 M Dzaidin CJ held as follows:

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It is of the upmost importance to stress here that the appellate court will not normally alter the sentence unless it is satisfied that the sentence passed by the lower court is manifestly inadequate or excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed or that the court has clearly erred in applying correct principles in the assessment of sentence, see *PP v. Loo Choon Fatt* [1976] 2 MLJ 256.

[36] In the upshot, this appeal is dismissed and the sentence imposed by the Sessions Court is affirmed.